No. 08-1314

In the

Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Three

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AND NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers ("Alliance") and the Association of International Automobile Manufacturers, Inc. ("AIAM") are non-profit national trade organizations whose member companies represent all of the major manufacturers of passenger vehicles sold in the United States. Respondent Mazda Motor of America, Inc. is a member of the Alliance.[2] The National Automobile Dealers Association ("NADA") is a non-profit national trade association representing 17,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

[2] The Alliance's other members are BMW Group, Chrysler Group LLC, Ford Motor Co.; General Motors Corp.; Jaguar Land Rover, Mercedes-Benz USA, Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; Volkswagen of America, Inc.; and Volvo Cars North America, LLC. AIAM's members are Aston Martin; American Honda Motor Co., Inc.; American Suzuki Motor Corp.; Ferrari; Hyundai Motor America; Isuzu Motor America, Inc.; KIA Motors America, Inc.; Maserati; McLaren Automotive; Mitsubishi Motor Sales of America, Inc.; Nissan; Peugeot; Porsche Cars of North America, Inc.; Saab Cars USA, Inc.; Subaru of America, Inc.; and Toyota Motor Sales USA, Inc.

repair, and parts sales. Together, the members of NADA employ upwards of 1,000,000 people nationwide.

The Alliance, AIAM, and NADA frequently participate as *amici* in cases addressing federal regulation of motor vehicles. *See, e.g.*, Alliance Br., *Geier v. American Honda Motor Co.* (No. 98-1811). In doing so, they present the broad perspective of vehicle manufacturers and dealers.

This case raises issues of enormous importance to *amici* and their members. When the members of the Alliance and AIAM design and manufacture a vehicle, they need to be able to know what liability regime they face. Similarly, dealers and their customers are directly impacted by and benefit from a single, comprehensive federal regime governing the safety features and systems inherent in the design of the vehicles they sell and service. When there is no Federal Motor Vehicle Safety Standard ("FMVSS") on point, or when the relevant FMVSS represents only a minimum safety standard, manufacturers understand that state law may be relevant. But when NHTSA has carefully studied and directly addressed a particular design issue in a FMVSS, and that FMVSS expressly gives manufacturers multiple options for that specific design issue, manufacturers (and lower courts) have understood that federal law prevents juries from later deciding that a State's tort law made one of those options illusory. Especially since this Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), manufacturers have

understood an option expressly furnished by the expert federal agency to be a *real* option.

In reliance on that understanding, the members of the Alliance and AIAM have designed and manufactured, and the members of NADA have sold to consumers, millions of vehicles over multiple model years, while appellate courts across the Nation have uniformly upheld the understanding that federal options remain real options. Not only *amici*'s members but also the consumers who purchase their products benefit greatly from a regime in which manufacturers can rely on such careful, formal, explicit, comprehensive decisions about vehicle design by the expert regulatory agency.

INTRODUCTION AND SUMMARY OF ARGUMENT

This tort suit seeks to impose a rule that Type 2 seatbelts were required in the rear center and aisle seats of the vehicle at issue. That mandatory requirement, however, conflicts with FMVSS 208, the federal regulation that embodies NHTSA's deliberate, comprehensive, and carefully-calibrated judgment about this precise seatbelt design issue. NHTSA specifically focused on the question whether Type 2 seatbelts should be required in rear center and aisle seats, and NHTSA specifically rejected a mandatory requirement for Type 2 seatbelts. Instead, based on the policy factors that the Safety Act directs NHTSA to consider, the agency decided that Type 2 seatbelts should be required in *other* seating positions, but that Type 2

seatbelts should be optional in rear center and aisle seats. Because petitioners' tort suit would "produce a result inconsistent with" that federal judgment, it must be set aside under the Supremacy Clause. U.S. Br. 11 (quotation omitted).

Ten years ago, this Court considered an almost identical question: Whether a state tort suit claiming that airbags were required was preempted by a different provision of FMVSS 208 that authorized manufacturers to install one of several restraint devices. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). This Court answered that question in the affirmative, holding that the tort suit was incompatible with the federal policy objectives embodied in FMVSS 208. *Id.*

Every federal and state appellate court to consider the question has concluded that this Court's decision in *Geier* governs cases like this one. And for good reason. The two cases involve similar provisions of the same regulation. They involve the same agency that went through the same formal process and carefully balanced the same statutory factors to arrive at the same result: a determination that federal objectives would best be served by giving manufacturers a choice. And both cases involve claims that a design option that NHTSA specifically decided to offer to manufacturers was a design defect under state law. But this case involves one factor that was not involved in *Geier*: a decade of lower court precedents reaffirming the validity of manufacturer reliance on *Geier* and confirming that the option given by FMVSS 208 was a meaningful one.

The government that failed to participate in any of these lower court decisions now comes in with a newly-minted position suggesting that *Geier* does not control. The government contends that this case is fundamentally unlike *Geier* because the agency, while expressly giving manufacturers an option, did not speak in terms of desiring a "mix" of the options it expressly authorized. U.S. Br. 9, 12. Preemption does not and should not turn on so flimsy a distinction. The government is not entitled to any special deference in interpreting *Geier* or the Supremacy Clause, and this case demonstrates the difficulty of giving the government's views any special weight. The government did not offer its idiosyncratic view while numerous lower court decisions taking a different view of *Geier* piled up.

The government asserts that the "the agency has spoken with a consistent voice for a lengthy period of time." U.S. Br. 29-30. In truth, the government stood mute on this issue while lower court precedents confirmed the view that a straightforward application of *Geier* called for preemption in this context. While the government stood silent, manufacturers designed and produced millions of vehicles in reliance on the analysis in *Geier*, the government's successful argument in that case, and the lower courts' consensus view that *Geier* applies fully to this neighboring provision of FMVSS 208. Deferring to a new government view that seizes on the presence or absence of explicit language referring to a "mix" of authorized options at this late date would turn *Geier* into an anomaly

and transform preemption doctrine into a trap for the unwary.

In the end, this case is indistinguishable from *Geier*. Rather than relegate *Geier* to obscurity as limited to the unusual cases where the agency not only allows flexibility but also expressly averts to the desirability of a mix, the Court should reaffirm *Geier* and the "ordinary pre-emption principles, grounded in longstanding precedent," that *Geier* applied. 529 U.S. at 874. Under those principles, a state-law rule that mandates what federal law expressly left optional would conflict with NHTSA's explicit and carefully considered judgment in FMVSS 208 that manufacturers should have the option to install Type 1 seatbelts in that seating position.

ARGUMENT

I. THIS CASE IS INDISTINGUISHABLE FROM AND GOVERNED BY *GEIER*.

A. *Geier* establishes the governing legal framework.

Petitioners urge this Court to adopt a "strong presumption against preemption" for claims under the Safety Act. Pet. Br. 21. The *Geier* Court, however, rejected just such a presumption and held that the Act's express preemption provision and its savings clause, taken together, codify "a neutral policy" that imposes no "special burden" on a party claiming conflict preemption. 529 U.S. at 870-71 (quotation omitted). The Constitution, moreover, contains its own presumption in favor of

preemption: the Supremacy Clause. U.S. Const. Art. VI, cl. 2. Congress enacts laws against the background of that Clause, and therefore "must be assumed to believe that federal law will prevail in any collision with state law." U.S. Br. 21, *Freightliner Corp. v. Myrick* (No. 94-286). And as this Court explained in *Geier*, ordinary conflict preemption principles reflect the common-sense point that "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." 529 U.S. at 885. The government agrees that "ordinary" conflict preemption principles apply here and that this tort suit is preempted if it conflicts with a federal standard by "produc[ing] a result inconsistent with the objective of [the Safety Act], or, as in *Geier*, with the objective of an implementing regulation." U.S. Br. 11 (quotation omitted).

Geier not only clarified the framework for conflict preemption under the Safety Act, it decided substantially the same question as presented here: Whether FMVSS 208 preempts a state tort claim that a car is defective for failing to implement a particular type of restraint, even though NHTSA had carefully considered and rejected requiring that restraint in favor of a federal policy that provided manufacturers a choice.

The plaintiff in *Geier* alleged that her car's design was defective because it did not contain airbags. *Geier*, 529 U.S. at 865. That claim, as a matter of law, would have obligated manufacturers to install airbags in every vehicle during the relevant timeframe. NHTSA, however, had decided

after extensive study to implement a federal policy that "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875. This Court examined "[t]he history of FMVSS 208" to understand "why and how" NHTSA had arrived at FMVSS 208, *id.*, and the Court explained that NHTSA had balanced multiple, sometimes-competing policy considerations—such as lower costs, technical safety problems, encouraging technological development, and winning consumer acceptance—in order to maximize the overall safety gains. *See id.* at 877-81.

This Court also focused on the fact that, in promulgating FMVSS 208, NHTSA had carefully considered and firmly rejected "a proposed FMVSS 208 'all airbag' standard." *Id.* at 879. The agency instead decided that greater safety would be achieved by giving manufacturers "a range of choices among different passive restraint devices." *Id.* at 875. Plaintiffs' tort suit was preempted because it was premised on a state-law requirement to install an airbag, while NHTSA had opted for a deliberate federal policy of offering manufacturers the option to install a different passive restraint system instead of an airbag. A state tort suit that mandates what federal law expressly made optional and renders the federal option illusory clearly frustrates the federal regime.

B. FMVSS 208 expresses a deliberate policy choice to provide manufacturers with seatbelt design options.

The only difference between this case and *Geier* is the superficial one that this case involves options for manual seatbelts and *Geier* involved passive restraints. Although the specific design issue differs, the preemption analysis does not. NHTSA's treatment of the seatbelt design issue in this case tracks its treatment of the passive restraint issue in every material respect. In *Geier*, this Court relied on the facts that NHTSA had (1) carefully considered the precise question that the state tort suit sought to litigate; (2) specifically rejected the design requirement that the tort suit sought to impose; (3) conscientiously considered and balanced the policy factors relevant under the Act; and (4) implemented a comprehensive federal policy that deliberately gave manufacturers a choice. *See* 529 U.S. at 875-81.

The same is true here. NHTSA (1) carefully considered whether to require Type 2 seatbelts in the seating position at issue here; (2) specifically (and repeatedly) rejected proposals to do so; (3) conscientiously addressed the same statutorily mandated mix of policy objectives of safety, cost, and technological feasibility; and (4) arrived at a comprehensive regulation that required Type 2 seatbelts in other seating positions but decided instead to give manufacturers a choice in this seating position. The very same process and rationale that led NHTSA to reject an all-airbag

standard led it to reject an all-Type-2-seatbelt standard in 1989. No less than in *Geier*, that process and rationale require the conclusion that a state tort suit attempting to mandate the design requirement rejected by the agency cannot proceed.

1. NHTSA carefully considered the precise issue that this tort suit seeks to litigate.

NHTSA devoted its full and careful attention to the question whether Type 2 seatbelts should be required in rear center and aisle seats. Neither petitioners nor the government takes issue with this point, and the record leaves no room for dispute that NHTSA focused directly on this issue and did so in multiple rulemakings spanning many years.

In the 1980s, NHTSA considered (and categorically denied) numerous requests that the agency mandate Type 2 seatbelts in rear center and aisle seats. First, the agency denied such a petition in 1984. *See* 49 Fed. Reg. 15241, 15241-42 (Apr. 18, 1984) (denying petition to "require the installation of Type 2 safety belts . . . in the rear outboard seating positions of passenger cars" because Type 2 belts did not "offer[] the maximum possible protection for children"). Then, in 1987, NHTSA granted a petition to "reexamine" whether "the installation of [Type 2] belts in rear seats" should be required. 52 Fed. Reg. 22848 (June 16, 1987); 53 Fed. Reg. 47982, 47983 (Nov. 29, 1988). The agency's "reexamination" of the seat belt issue was thorough, spanning four years (from 1987-1991), involving over a hundred comments, and resulting

in a "detail[ed]" agency analysis of the costs and safety benefits of rear seatbelts. 53 Fed. Reg. at 47983.

In particular, the 1989 amendments to FMVSS 208 reflect the thoroughness of the agency's rulemaking process. After granting the 1987 petition to reconsider its stance on rear seatbelts, NHTSA published an advance notice of proposed rulemaking (ANPRM), explaining that the agency was considering requiring Type 2 seatbelts in some rear seats and requesting comments regarding the agency's "concern[]" that the "costs [of Type 2 seatbelts in rear center seats] are extremely disproportionate to the safety benefits." 52 Fed. Reg. at 22849. In response to the ANPRM, 34 comments were received and "carefully considered" in developing a November 1988 Notice of Proposed Rulemaking (NPRM). 53 Fed. Reg. at 47983. The NPRM explained that NHTSA had tentatively determined that Type 2 belts should be required in rear outboard seating positions only. Seventy additional comments were then considered leading to NHTSA's promulgation of a final rule in June 1989 that required Type 2 seatbelts in rear outboard seating positions, but continued to give manufacturers the choice to install either a "Type 1 or Type 2 seat belt assembly" in rear center and aisle seating positions. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967).

The agency's conscientious and thorough consideration of the precise issue that the state claim here implicates puts this case on all fours

with *Geier* and stands in stark contrast to the absence of focused agency attention in *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187 (2009).

Both the *Wyeth* majority and the dissent made clear that whether FDA had focused on the adequacy of Phenergan's warning concerning "IV-push" was of great importance. The Court approved the state court's finding that FDA gave no more than "passing attention to the issue of IV-push." *Id.* at 1199 (internal quotation marks omitted); *see also id.* at 1203 n.14 ("As we have discussed, the FDA did not consider and reject a stronger warning against IV-push injection of Phenergan."). The dissent, in contrast, read the record as showing that "the FDA specifically considered and reconsidered the strength of Phenergan's IV-push-related warnings in light of new scientific and medical data." *Id.* at 1222 (Alito, J., joined by Roberts, C.J., and Scalia, J., dissenting).[3]

Moreover, the opinions in *Wyeth* make clear that FDA's specific focus (or lack thereof) on the issue presented in the tort suit was central to the distinguishability of *Geier*. Wyeth argued that this "case resemble[d] *Geier* because the FDA

[3] The Court's description of the pre-emption argument it was rejecting further underscores the centrality of this debate over whether FDA had focused on the issue presented by the tort claim. "Once the FDA has approved a drug's label," the argument went, "a state-law verdict may not deem the label inadequate *regardless of whether there is any evidence that the FDA has considered the stronger warning at issue*." *Id.* at 1202 (emphasis added).

determined that no additional warning on IV-push administration was needed," but the majority dismissed that argument as "belied by the record." *Id.* at 1203 n.14. The dissent argued that the majority was misreading the record "[i]n its attempt to evade *Geier*'s applicability to this case," because "it is demonstrably untrue that the FDA failed to consider (and strike a 'balance' between) the specific costs and benefits associated with IV push." *Id.* at 1222.[1]

2. NHTSA rejected the very design requirement that this tort suit seeks to impose.

The government acknowledges that "NHTSA's determination not to require Type 2 seatbelts was reached through careful consideration and based on sound reasons," U.S. Br. 19, but argues that that determination is irrelevant because the agency did not "reject" an all Type-2 standard. U.S. Br. 19-20. That revisionist view of history does not withstand scrutiny.

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[1] The *Wyeth* majority also deemed it significant that FDA had staked out a pro-preemption position in a less formal way contrasting NHTSA's formal rulemaking at issue in *Geier* with FDA's "mere assertion" of a conflict. *Id.* at 1201; *see also id.* at 1203. And Justice Breyer "w[r]ote separately to emphasize the Court's statement that 'we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law.'" *Id.* at 1204 (Breyer, J., concurring). The extensive record of formal rulemakings by NHTSA — in large part the same administrative process at issue in *Geier* — yet again confirms that *Wyeth* is entirely distinguishable.

During the 1980s, NHTSA time and again rejected proposals to require Type 2 seatbelts in rear center and aisle seats. In 1984, NHTSA denied a petition to require Type 2 seatbelts in rear seats, finding that they were not the safest option for children and could discourage the use of child safety seats. 49 Fed. Reg. at 15241-42. In its 1988 NPRM, NHTSA proposed to exclude center seats from a Type-2 mandate because of "technological difficulties" and its forecast of "small safety benefits and substantially greater costs." 53 Fed. Reg. at 17984. NHTSA adhered to its rejection of an all-Type-2 mandate in its 1989 final rule, finding that proponents had not proffered any "new data that would cause the agency to change its tentative conclusion." 54 Fed. Reg. at 46258. The agency, moreover, clarified that safety and design problems posed by Type 2 belts in rear *aisle* seats had led it specifically to reject proposals to require Type 2 seatbelts in that seating position. *Id.* at 46258.

The government also argues that the key distinction between this case and *Geier* is that, in *Geier*, NHTSA rejected an all-airbags-right-away standard. U.S. Br. 10. That is no distinction at all. The agency's decision-making process is indistinguishable: In both rules, the agency encouraged early installation of one technology, even while expressly permitting manufacturers to opt for a different technology. *Geier* acknowledged that NHTSA had not "guarantee[d]" any "mix" of devices; the rule did not forbid installing more airbags, or doing so sooner, than the agency had required. 529 U.S. at 879. To the contrary, the rule "provided a form of *extra credit* for airbag

installation." *Id.* (emphasis added). Thus, the fact that NHTSA "encourage[d]" manufacturers to design and install Type 2 seatbelts *if* they could do so "without interfering with the aisleway's purpose of allowing access," 54 Fed. Reg. at 46258, only makes this case more like *Geier*. *See* 529 U.S. at 879. Indeed, NHTSA's qualified encouragement here is a lesser incentive than the "extra credit" in *Geier*.

In sum, it is just as clear in this case as in *Geier* that NHTSA not only directly considered but also firmly and specifically rejected the rule that this tort suit seeks to impose.

3. NHTSA's decision was based on the policy considerations required by the Safety Act.

It is equally obvious from NHTSA's contemporaneous explanations of FMVSS 208 that its decision to give manufacturers a choice between Type 1 and Type 2 seatbelts for rear aisle seats was policy-driven. Like the agency decision at issue in *Geier*, NHTSA's decision here was based on the multifaceted policy considerations contemplated by the Act, including technological constraints and cost as well as safety.

At the outset, petitioners and the government argue that cost and technological constraints are inappropriate factors and that NHTSA's reliance on them cannot support preemption. Pet. Br. 42; U.S. Br. 29. But that costs-are-irrelevant approach ignores both common sense and the reality that the agency is statutorily *obligated* to consider cost and

technology. 49 U.S.C. § 30111(b)(3) (directing DOT to consider "whether a proposed standard is reasonable, practicable, and appropriate"); H.R. Rep. No. 89-1776, at 16 (1966) ("practicality" compels DOT to consider "technological ability to achieve the goal of a particular standard as well as ... economic factors"). Under the Safety Act, cost-benefit considerations are every bit as legitimate as "pure" safety considerations — which is not surprising given that cost and safety are inherently related in this context. *Cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ___, 129 S. Ct. 1498 (2009). The Safety Act, after all, governs vehicles driven by real consumers. Not all consumers can afford the newest model or the safest design theoretically available. Safety mandates that increase the cost of newer cars can lead some consumers to keep older, less-safe cars for a longer time, which actually undermines safety. *See Geier*, 529 U.S. at 878.[5] Reason, as well as the Act, obligates NHTSA also to consider the opportunity costs of potential safety measures: "[R]equiring significant industry and agency resources to be spent for relatively little safety gain can result in a lost opportunity to better improve vehicle safety through other means . . . ." 52 Fed. Reg. at 22819.

[5] The government elides this important point in this brief by suggesting that the relevant question is whether passengers would be more likely to buckle up a Type 2 or a Type 1 belt. U.S. Br. 24. That question does not arise if a new safety mandate raises the cost of new vehicles and leads consumers to keep older vehicles with Type 1 belts at multiple seat locations and without other safety enhancements.

This Court recognized the link between cost and safety in *Geier*, concluding that FMVSS 208 "would . . . lower costs . . . which would promote FMVSS 208's safety objectives." 529 U.S. at 875. The government recognized this link in *Geier* too, arguing that this Court should consider the agency's cost-benefit analysis in determining whether the federal policy resulting from that analysis preempted state tort law. U.S. *Geier* Br. 4-5. The government was correct then. *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) ("The agency is correct to look at the costs as well as the benefits of Standard 208.").

With respect to the statutorily-mandated considerations of cost and technological constraints, NHTSA explained that "there [were] more technical difficulties associated with any requirement for [Type 2] belts at center rear seating positions, and that [Type 2] belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. at 46258. Similarly, the agency concluded that Type 2 belts should not be required in rear aisle positions because of safety and design concerns that the shoulder harness would stretch "across the aisleway" and "cause entry and exit problems for occupants." 54 Fed. Reg. at 46258; 55 Fed. Reg. 30944, 30945 (July 30, 1990). While vehicle modifications may have been possible, the agency decided that forcing such modifications would be unwarranted because they would require structural changes to the roof and "impose

disproportionately high costs." 54 Fed. Reg. at 16258.

Safety concerns also contributed to NHTSA's decision that Type 2 belts should not be required in rear center and aisle seats. Child safety was the primary reason the agency rejected a Type 2 seatbelt requirement in 1984 for all rear seats. 53 Fed. Reg. at 17982. And NHTSA continued to consider the difficulties that inhere in designing seatbelts that tightly secure child seats and also safely restrain older children, teenagers, and adults. *See, e.g.*, 53 Fed. Reg. at 17982 (describing 1984 decision as "focused primarily on the child safety issues" and noting that permitting Type 1 belts in rear center seats "would offer greater protection to children than [a rule] requiring lap/shoulder belts"); 58 Fed. Reg. 46928, 46929 (Sept. 3, 1993) (permitting, for the first time, testing of child seats with shoulder belts); 64 Fed. Reg. 10786, 10788 (Mar. 5, 1999).

To the extent the government suggests that this case is different from *Geier* because NHTSA would have been happy if all manufacturers immediately adopted Type 2 belts in rear aisle and center seats, U.S. Br. 10, the agency's contemporaneous explanations of its decisions in and leading up to FMVSS 208 tell a different story. That history is the one that controls.

4. NHTSA established a comprehensive federal policy.

The government retrospectively characterizes FMVSS 208 as nothing more than a "minimum

standard" that did not undertake to consider whether additional requirements were appropriate. U.S. Br. 18-19. As in *Geier*, however, NHTSA's contemporaneous explanation "make[s] clear that the standard deliberately provided the manufacturer with a range of choices." *See* 529 U.S. at 875. FMVSS 208 expresses NHTSA's deliberate policy decision to provide a choice between a Type 1 and Type 2 seatbelt in certain seating positions (but not in others). That "free[dom] to choose among those options," U.S. Br. 8, was an important piece of the regulatory framework. In 1994, after the vehicle in this case was manufactured, NHTSA's Chief Counsel explained why: "We believe the vehicle manufacturer is in the best position to balance, for its vehicles, the benefits associated with [the] extra protection [afforded by Type 2 belts] against any difficulties related to occupants entering and exiting the vehicle." Letter from Philip R. Recht, NHTSA Chief Counsel, to Roger Matoba (Dec. 28, 1994) ("Recht letter").

Petitioners and the government claim that this case is like *Spriestma v. Mercury Marine*, 537 U.S. 51 (2002), but they are mistaken. Pet. Br. 42-43; U.S. Br. 23-24. As the Court explained in that case, the Coast Guard's "decision *not* to impose a [particular] requirement," when considered in its proper historical and regulatory context, was not "an affirmative policy judgment" intended to be "authoritative." 537 U.S. at 67 (quotation marks omitted). Rather than deciding *how* the issue of propeller guards should be resolved, the Coast Guard merely decided "not to regulate [that]

particular aspect of boating safety." *Id.* at 65. Precisely because propeller guards were "an area not yet subject to federal regulation," it did not frustrate the federal regulatory scheme for States to regulate them. *Id.* at 66.

This case could not be more different. NHTSA did not "fail[] to regulate" seatbelts. U.S. Br. 19, *Sprietsma* (No. 07-106). NHTSA did not consider only part of the universe of seatbelt design in passenger cars and defer other parts, including the issue in this case, pending further study. NHTSA did not "decide not to decide" the issue or suggest that its resolution was provisional or less than authoritative. To the contrary, the agency made "an affirmative 'policy judgment,'" *Sprietsma*, 537 U.S. at 67, that the federal statutory policies regarding seatbelts would best be served by preserving manufacturer choice as to rear center and aisle seats (but only as to those seats). And NHTSA's Chief Counsel subsequently explained that the agency expressly left that choice to manufacturers, not the States, because manufacturers were in the best position to balance the extra protection that Type 2 belts could provide with the entry and exit obstacles they posed. The *Sprietsma* Court's explanation of why that case was nothing like *Geier* confirms that this case is indistinguishable from *Geier* and nothing like *Sprietsma*: the Coast Guard's decision to "take no regulatory action" stands in "sharp contrast" to NHTSA's decision that allowed manufacturers to install "*alternative* protection systems . . . rather than one particular system in every car." 537 U.S. at 65, 67 (emphasis in original).

C. The federal and state courts of appeals are unanimous that *Geier* mandates preemption of tort suits like this one.

For the reasons set out above, *amici* submit that this case is indistinguishable from *Geier*. Numerous federal and state appellate courts across the Nation have confronted this question, and literally every one of them has agreed. None has found that NHTSA's decision to give manufacturers a choice between Type 1 and Type 2 seatbelts in rear center and aisle seats was anything less than a deliberate decision reflecting federal policy objectives and forming part of a comprehensive federal regulatory scheme. *See, e.g.*, Pet App 12a-18a (decision below); *Carden v. Gen. Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000) (D. Wood, J.); *Roland v. Gen. Motors*, 881 N.E.2d 722, 728-29 (Ind. App. 2008); *Hemmelgarn v. Volvo Car Corp.*, 809 N.E.2d 1091 (Mass. App. 2004).

These courts have faithfully followed *Geier*'s analytical approach, parsing the regulatory history of FMVSS 208 and concluding without exception that FMVSS 208 implements "a comprehensive regulatory scheme," not a minimum safety standard. Pet App 20a. This Court, unlike those lower courts, is free to overrule *Geier* or limit it to its facts. However, *Geier* was correct when it was decided and is materially indistinguishable from this case. Indeed, as explained next, the only

relevant consideration that differentiates this case from *Geier* is the decade of reasonable reliance by manufacturers on *Geier* and its principles.

II. THE EXTENSIVE RELIANCE ON THE CONSENSUS UNDERSTANDING OF *GEIER* UNDERSCORES THAT PREEMPTION IS APPROPRIATE.

In the decade since *Geier* was decided, manufacturers have consistently relied on *Geier* and the preemption principles it announced. *Geier* confirmed that when federal law gives manufacturers an option among safety devices, the federal option is a real one. Under *Geier*, manufacturers would not find out years later, after design decisions have been made and millions of vehicles have left showrooms, that the federal option was illusory. The need for clear and understandable rules of preemption cannot be overstated. The question a manufacturer confronts before it produces a car is a practical one: "Do we need to install an airbag and Type 2 seatbelts in rear center and aisle seats?" *Geier* seemingly supplied a clear answer: "No federal law gives you a choice." The clarity of that answer was then confirmed by numerous lower court decisions. Even lower courts that disliked the *Geier* framework recognized that *Geier* controlled this issue. *See Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 91 (W. Va. 2009). It is too late in the day to render both the clarity of *Geier* and the option provided by federal law illusory. But that is precisely what the government and petitioners advocate.

In none of that extensive lower court litigation did the government ever suggest that *Geier* was not controlling. And as the pro-preemption precedent piled up, the government never breathed a word to suggest that *everyone* was misreading *Geier*, instead standing mute even through multiple appeals and petitions for *certiorari* in this Court. Thus, manufacturers relied not only on *Geier* and the lower courts' application of *Geier* to this issue, but also on the government's own silence.

Not only did the Department of Justice remain on the sidelines, but NHTSA also did nothing to suggest that *Geier* was inapposite or that the myriad lower court decisions applying it to find preemption in cases like this one misunderstood the agency's decisions. NHTSA could have made clear initially that it stopped short of mandating type 2 seat belts at all positions only because it wanted to gather more information before making a decision as to a particular issue or because it wanted to leave the States free to go further. The agency, however, said nothing of the sort in its explanations of the decisions at issue here. And once lower courts began to treat the issue here as controlled by *Geier*, NHTSA could have clarified that its regulatory actions were being misunderstood. To be sure, a post-hoc attempt to recharacterize its earlier decisions or to stake out a different position on preemption might itself have been suspect, *see Wyeth*, 129 S. Ct. at 1201 n.3, but NHTSA did not even offer even that. Until this Court called for the views of the Solicitor General in this case, NHTSA never did or said anything, with any degree of formality or persuasiveness, to

suggest that the courts all were misapplying *Geier* and misunderstanding NHTSA's own actions. If indeed it was NHTSA's view that preemption was inappropriate in cases like this, that view was a well-kept secret.

Nor were manufacturers the only interested parties to rely. Congress too has understandably relied on *Geier* and the consensus understanding of *Geier* exemplified by the decision below. Congress has never suggested that the *Geier* Court misinterpreted the Safety Act's preemptive reach. It has not sought to change the Act's provisions that bear on the preemption issue or otherwise to abrogate or limit the effect of *Geier*'s holding. In enacting Anton's Law, Congress chose to leave the preemption framework untouched and simply exercised its prerogative to resolve a particular vehicle safety issue itself rather than delegate its resolution to the agency. *See* 69 Fed. Reg. 70901, 70904-06 (Dec. 8, 2004).

The government now asks this Court to frustrate all that reasonable reliance by limiting *Geier* in a wholly unanticipated manner. For the very same FMVSS as in *Geier*, and for a rule developed by the same process as in *Geier*, the government suggests that the choice given to manufacturers was illusory because NHTSA did not express a specific desire for a "mix" of Type 1 and Type 2 seatbelts in rear aisle seats. That supposed distinction does not withstand scrutiny, *see infra* at 27-29, and eluded every appellate court to consider the issue.

But more important, that is far too flimsy and novel a distinction to justify pulling the rug out from an entire industry's years of reasonable reliance on what everyone understood *Geier* to mean. Preemption is an important part of our federal constitutional framework. The rules need to be predictable and stable enough for regulated entities to rely on them at the time they engage in the primary conduct that federal law regulates. It is too late now for manufacturers to revisit design decisions they made based on a deliberate federal decision to allow an option for certain seating positions, but not others. Preemption rules that do not provide clear guidance or that turn on government positions not announced until a decade after the relevant regulatory and design decisions will frustrate federal objectives. In the absence of clear rules, regulated parties will not be able to rely on federal rules seemingly allowing options even when the federal agency affirmatively wants there to be meaningful federal options. The Court should decline the invitation to transform the clear framework of *Geier* into a trap for the unwary.

III. THE GOVERNMENT IS NOT ENTITLED TO DEFERENCE.

This case is governed by *Geier*. Needless to say, the Court does not owe anyone deference in interpreting its own decision. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336-37 n.5 (2000). To be sure, in some past preemption cases, where the relevant agency has been consistent and persuasive in explaining its actions and how the regulatory regime that it administers works in

practice, the Court has looked to that explanation to aid in its understanding of the legal question whether a state-law claim frustrates the federal regime. But the Court has never suggested that an agency, or the Solicitor General, is entitled to any deference on that legal question. *Wyeth*, 129 S. Ct. at 1201 ("[W]e have not deferred to an agency's *conclusion* that state law is pre-empted. Rather, we have attended to an agency's explanation of how state law affects the regulatory scheme.") (emphasis in original).

The government's position in this case should be viewed with skepticism in any event. For a decade, while appellate court decisions unanimously holding that FMVSS 208 preempts claims like this one piled up, the government never articulated a contrary view. Even when the new Administration issued an Executive Order on Preemption, 74 Fed. Reg. 24693 (May 22, 2009), that was intended on its face to mark a break from the previous approach to preemption, NHTSA still failed to give any hint that it disagreed with the courts' consensus interpretation of *Geier* and its own actions.

The extensive reliance on the consensus understanding of *Geier* discussed above makes it even more inappropriate to give special deference to the government's newly announced position. It would be one thing if the government had been participating in these cases over the years and had staked out a clear and consistent position. But it makes no sense to have a regime where the Solicitor General's brief is treated as the key input when that input comes long after numerous courts

across the Nation have held that seatbelt claims like petitioners' were preempted under the rationale of *Geier* and many model years after the relevant practical decisions to rely on the government's regulatory decision have been made.

In short, as best anyone in the regulated community can tell, this too is a case, like *Wyeth*, where the position taken in the government's brief "departs markedly from the [agency's] understanding at all times relevant to this case." *Wyeth*, 129 S. Ct. at 1203 n.13. That is all the more reason why the Court should discount the government's belated take on NHTSA's actions in favor of focusing on what the agency actually did and said in issuing the standards at issue.

2. The government argues that this Court should defer to its position because "the agency has spoken with a consistent voice for a lengthy period of time." U.S. Br. 29-30. But the one thing the government clearly has *not* done is speak with any voice, let alone with a consistent one, on the issue here. Indeed, the only thing consistent about the government's past position on the issue here is its failure to weigh in as the precedents applying *Geier* have accumulated.

In its effort to show that it has staked out a "consistent" position, the government addresses a straw man: the broad argument that any regulation that affords a choice preempts state tort suits. *See* U.S. Br. 30-31. That the government has consistently stated that "the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint

systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted," U.S. Br. 30 (quoting U.S. Br. 15, *Wood v. General Motors Corp.* (No. 89-16)), is irrelevant. The question here is whether the standard at issue "mere[ly]" means that manufacturers could comply with federal law by installing either a Type 1 or a Type 2 seatbelt, or whether — as in *Geier* — the standard reflects a federal policy judgment that manufacturers should have an affirmative, meaningful option. The government has been equally consistent in arguing that the latter type of standard preempts contrary state tort rules, *see* U.S. *Geier* Br. 23-26, at least until this case.

Retreating to the broad proposition that a failure to require a particular technology, "without more," does not preempt tort suits, U.S. Br. 13, 29, does not answer the question whether the standard here merely failed to require Type 2 seatbelts (in the minimalist sense that the Coast Guard failed to require a propeller guard in *Sprietsma*), or whether, as in *Geier*, the agency reached a careful policy judgment that either of two options was appropriate and should be authorized. NHTSA's contemporaneous statements establish that the agency established a deliberate, well-considered federal policy that was intended to leave manufacturers free to choose between the authorized options. *See supra* at 14-18. The government would not get deference if it openly adopted a new position in this litigation that was contrary to the agency's contemporaneous statements. *Cf. Wyeth*, 129 S. Ct. at 1201 ("The

FDA's 2006 position plainly does not reflect the agency's own view at all times relevant to this litigation."). It should fare no better for its effort to skirt the key issue by claiming consistency at an irrelevant level of generality.

3. Some of petitioners' *amici* are candid about wanting this Court to overrule *Geier* or relegate it to obscurity by limiting it to its specific facts. *See, e.g.*, State of Illinois Br. 25. Although the government purports to reaffirm *Geier* and its position in *Geier*, there should be no mistake: Accepting the government's submission here would have the very same effect. If the government's current position is correct, *Geier* is a highly idiosyncratic decision with remarkably little real-world relevance. Regulatory agencies do not frequently have occasion to speak in express terms of desiring a "mix" of approaches to an issue. Generally, what agencies want in conferring options is a degree of flexibility for the regulated community. It will be the rare case where the agency affirmatively desires not just flexibility but that the regulated community exercise that flexibility in a manner that achieves a pre-ordained "mix." Nor, until the government's brief in this case, did regulatory agencies (or regulated entities and individuals) have any reason to believe it was critical whether an agency used such language. To limit *Geier* to cases where the agency happens to have used such language would be to consign it to oblivion.

Certainly none of the Members of this Court has understood *Geier* to be an insignificant decision

limited to quirky facts. The dissenters in *Geier* accused the majority of doing much more than issuing a fact-bound decision that would have no broader application. *See Geier*, 529 U.S. at 886-913 (Stevens, J., joined by Souter, J., Thomas, J., and Ginsburg, J., dissenting). And *Geier* has figured prominently in the Court's more recent preemption cases. *See, e.g., Wyeth*, 129 S. Ct. at 1200-01, 1203; *id.* at 1220-22, 1227-29 (Alito, J., joined by Roberts, C.J., and Scalia, J., dissenting); *Sprietsma*, 537 U.S. at 65-68.

It would be inconsistent with *Geier* and the traditional Supremacy Clause principles that it applied to make preemption turn on whether an agency spoke in terms of a "mix." Under the Safety Act, and under the Supremacy Clause more generally, what matters is whether a state-law claim would frustrate the federal regulator's purposes. Such frustration can occur just as readily when federal regulators' purpose is to confer meaningful flexibility as when the purpose is to achieve a particular "mix." Indeed, the government appears to recognize as much in other contexts in which it has concluded that state efforts to mandate what federal law encourages but leaves voluntary frustrate the federal objective. *See* U.S. Br. 33-34, *Chamber of Commerce v. Whiting* (No. 09-115) (citing, *inter alia*, *Geier*).

Where an agency has carefully considered and specifically rejected the precise rule sought by a state tort suit, it stands to reason that the suit often will present an obstacle to the "accomplishment . . . of the full purpose and

objectives" of the federal regime. *Hines*, 312 U.S. at 67. To be sure, if the agency does not reject the tort-suit rule on its merits but rather postpones its decision on the issue pending further study, or declines to extend federal regulation to a new area, then the nature of the agency's decision or the regulatory context may make clear that the agency in effect left the issue open for the States and a state tort suit would not frustrate the federal scheme.

But FMVSS 208 cannot be written off as a decision not to decide or a decision to ensure flexibility for state law regulation. NHTSA carefully considered whether Type 2 seatbelts should be required in rear center and aisle seats as well as in other seating positions; it specifically resolved that issue in a formal and clear manner; it decided to affirmatively permit manufacturers to choose a Type 1 or Type 2 seat belt assembly in those seating positions (unlike in most other seating positions), 54 Fed. Reg. at 46258; and in doing so it relied on the same statutory policy factors of technological feasibility, safety, and cost as in *Geier*. As Judge Wood explained, it is "hard to see any significant difference between the two [regulatory actions]." *Hurley*, 222 F.3d at 381, and there is no basis for a different result in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

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